



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to
Implement Senate Bill No. 1488 (2004
Cal. Stats., Ch. 690 (Sept. 22, 2004)
Relating to Confidentiality of
Information

Rulemaking
05-06-040

**OPENING COMMENTS OF
THE DIVISION OF RATEPAYER ADVOCATES ON
THE PROPOSED DECISION IN R.05-06-040 TO IMPLEMENT
SENATE BILL NO. 1488 RELATING TO CONFIDENTIALITY OF
PROCUREMENT INFORMATION**

I. INTRODUCTION

Pursuant to Rule 71.1 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) submits its opening comments on the Proposed Decision (PD) in the Rulemaking to Implement Senate Bill No. 1488 Relating to Confidentiality of Procurement Information.

DRA supports the PD because it attempts to clarify and distill, in one document, Commission treatment of procurement data in Commission proceedings. This clarification meets all the directives the Legislature issued to the Commission in Senate Bill 1488. DRA is encouraged by the PD's thorough responses to all the objections parties have regularly made to upset the expedient resolution of confidentiality issues involved in proceedings.

However, DRA is concerned that the discussion on "Access to ESP Data" in the PD did not mention DRA's rights to such data, nor did it fully clarify that the PD is not

attempting to limit DRA's rights to receive data by that discussion. This omission may lead parties to conclude that the same section of the PD applies to DRA, because it discusses "non-market" participants' access to ESP data. The PD should be clarified to unequivocally state that DRA's rights to any data, regardless of confidentiality, are coextensive with the rights of the Commission staff to such data under California Public Utilities Code.

DRA would also like to see more clarification in the definition of materiality in this decision. While DRA supports the Commission's decision not to be constrained by definitions in the statutes of other agencies, there seems no reason why a perfectly good definition of materiality should be rejected outright unless the Commission has specified the preferred definition in its decision.

The PD also sets out a proposed scope for Phase II of this proceeding and invites parties to comment on the proposed scope. DRA views the Phase II work as the heart of the implementation process, whereas Phase I addresses terminology and defines the parameters of the legal and policy considerations necessary to implement Section 1488. DRA will comment on this proposed scope.

II. THE PD ADEQUATELY IMPLIMENTS THE FIRST PRONG OF SENATE BILL 1488 REQUIREMENT

The PD "examine[s]" Commission "practices under Sections 454.5 and 583 of the Public Utilities Code and the California Public Records Act" as directed by SB 1488. This examination is all that SB 1488 requires, provided the Commission found that its practices under the relevant provisions "ensure[s] ... meaningful public participation." The PD did not expressly determine whether the Commission practices it examined "ensure...meaningful public participation", but chose instead to adopt a forward-looking perspective that develops additional processes for addressing restrictions on disclosure of confidential information.

While the PD does not expressly say so, it implicitly concludes that Commission practices regarding confidentiality of procurement data do not impair meaningful public

participation of any segment of the public. This is evident in the PD's rejection of most, if not all, of the arguments parties have consistently presented in favor of much broader disclosure of confidential information.

There is no evidence that in enacting SB 1488 the Legislature was concerned with enhancing the competitive posture of generators. While we accept that the release of more information on utility procurement could lead to more efficient investment decisions, we must guard against the release of more information that can lead to more opportunities for market manipulation. We seek to strike a balance between the rights of the public to open decision making, particularly with regard to the expenditure of ratepayer money, and the realization of market efficiencies through better information flow on the one hand, and the prevention of market manipulation on the other.

(PD, pp. 16-17.)

DRA notes this implicit conclusion because parties may otherwise claim the PD adopted an aggressive schedule to increase access to confidential information. As the PD makes clear, it simply seeks to develop a policy that strikes a clearer balance between competing interests than currently exists. DRA commends the PD for adopting a forward-looking schedule for the second phase in this proceeding.

III. NON-MARKET PARTICIPANTS' ACCESS TO CONFIDENTIAL DATA

The PD should be revised to expressly state that DRA's right of access to confidentiality data in Commission proceedings is coextensive with the rights of Commission staff.¹ Otherwise DRA may have to deal with objections to DRA's right of access to such data. For example, the PD discusses Non-Market Participants Access to Confidentiality Data, but only specifies interveners like TURN and Green Power Institute. DRA supports the PD's ruling on the privileges of non-market participants to view confidential ESP data, provided they sign non-disclosure agreements. However,

¹ Appendix A provides additional Findings of Fact and Conclusions of Law on this important point.

DRA's right to such data is much broader than that of interveners and must be acknowledged to be the same as that of Commission staff.

In Commission decisions discussing discovery of information and data from utilities, DRA is considered Commission staff. Thus, DRA is subject to Sections 583 and 2112 even though these statutes only refer to "staff". Therefore, the PD's discussion of these sections is applicable to DRA in the same manner as it is applicable to the Energy Division. Regarding these statutory provisions, the PD stated:

TURN and AReM raise an important point – that neither §583 nor §454.5(g) directly apply to ESPs. Section 583 is limited to information furnished to the Commission by a "public utility." Section 454.5(g) only relates to "electrical corporations" who submit procurement plans. No one asserts that ESPs are public utilities, and AReM asserts that they are not electrical corporations either.² While there may be instances in which the latter point is incorrect, we will assume for the sake of argument here that the ESPs before us meet neither the §583 nor the §454.5(g) definition. While we cannot write ESPs into either statute,³ we also believe it is within our discretion to require that all parties that come before us follow the same procedure in seeking confidentiality designations for their documents.

We disagree with AReM, however, that we should notify Commission staff that they must execute non-disclosure agreements and agree to be bound by §2112 when receiving ESP data. It is inappropriate to require Commission staff to enter into private contractual agreements with the entities we regulate or that otherwise come before us. As for §2112, which creates a misdemeanor and penalties for violation, among other things, of Commission orders, we do not need to instruct staff to obey the law. The statutory requirements in §2112 exist regardless of what we tell staff, and it would be cumbersome to issue instructions to staff every time they receive confidential information.

² AReM/CNE Opening Brief at 10 n.11 & 11 n.12.

³ Section 583, for example, makes it a crime for Commission staff to disclose information furnished by public utilities that the Commission has deemed confidential. The Commission cannot apply this criminal provision to data from non-public utilities.

(PD, pp. 52, 53.)

Like the PD's discussion of Non-Market Participants Access to Confidentiality Data, the PD fails to expressly mention DRA. Because AReM has previously challenged this position and may do so again in the future, the PD should make it clear that DRA and Commission staff are to be treated the same for purposes of access to confidential data.

IV. THE SCHEDULE FOR THE PHASE II

The PD initiates a Phase II schedule in this proceeding and invites the parties to comment on particular issues for Phase II. DRA supports the employment of two of the issues listed in Phase II, and proposes further discussion and consideration of the issue regarding penalties.

The issues in Phase II are as follows:

- 1.) A motion that simply asserts, without explanation, that the data contain trade secrets or "market sensitive" information will be denied as incomplete.
- 2.) A party whose motion has been denied for violation of item 1 that refiles the motion in substantively the same form may be subject to penalties pursuant to §2107 at the discretion of the Assigned Commissioner, Assigned Administrative Law Judge (ALJ) or Law and Motion ALJ.
- 3.) A party seeking confidentiality treatment shall provide in its motion, in text or table form, the following information:
 - a. Legal basis for asserting confidentiality (*e.g.*, §454.5(g), trade secret, privilege);
 - b. If covered by the IOU or ESP Matrix in R.05-06-040, the category/ies into which the data fall, with an explanation of how the data match the category/ies in the Matrix.;
 - c. Discussion of why the data should be kept under seal;
 - d. Identification of appropriate procedures short of submitting entire documents under seal or in redacted form, such as partial sealing of documents; partial redaction; aggregation of data to mask individualized, sensitive information;

delayed information release (after documents are no longer market sensitive); restriction on personnel with access to documents; use of averages, percentages or annualization of data instead of monthly or hourly data; and issuance of guidelines for parties to follow in producing redacted information (*e.g.*, leaving headings in documents; limiting redactions to figures only; and leaving sufficient information in documents to give other parties notice of what has been redacted).

Parties may not assume that their motions have been granted if the Assigned Commissioner, Assigned ALJ or Law and Motion ALJ do not act on them. The onus shall be on parties to follow up with the Assigned Commissioner, ALJ or Law and Motion ALJ to seek a ruling, if one is not issued within 60 days of filing of the motion.

- 4.) Parties may not assume that their motions have been granted if the Assigned Commissioner, Assigned ALJ or Law and Motion ALJ do not act on them. The onus shall be on parties to follow up with the Assigned Commissioner, ALJ or Law and Motion ALJ to seek a ruling, if one is not issued within 60 days of filing of the motion.

A. Motion Asserting Confidentiality Without Explanation

It is appropriate for the Commission to adopt a rule that denies any motion asserting without explanation that data is confidential. The claim of confidentiality must be substantiated. Thus, parties entitled to the privilege may waive it if they do not make the requisite showing. Therefore, it is incumbent on those parties entitled to the privilege to establish in every instance applicable, the extent to which they intend to assert or waive that privilege.

B. Penalties For Non-Compliance

The Commission should not now devise a penalty scheme for implementing the confidentiality process in the PD before a practical application of the matrix has been tried.

DRA is concerned that a penalty scheme devised too soon will have one or two undesirable effects. First, the utilities may find a way to pass the cost on to their customers regardless of how the penalty law is written to prevent them from doing so.

Second, a penalty that does not ensure compliance will not serve the process well, and might actually allow parties to opt for the penalty rather than the disclosure.

However, DRA believes that the Commission must take the processes recommended in the PD from theory to practice. Rather than a penalty, the Commission should inform parties that where they fail to provide substantiation for claims of confidentiality, the Energy Division, with input from parties, will be directed to make the determination of confidentiality based on its assessment of the matrix requirements.

Adopting this recommendation will involve all parties in the practical application of the matrix and encourage the utilities to comply with the process.

C. INFORMATION REQUIRED IN A MOTION FOR PROTECTIVE ORDERS

DRA supports the PD's proposal for information the utilities should make available in their motions for protective order. This information will ensure, as the PD notes, that parties do not overstate the need for confidentiality.

As clarification of the requirement that information be kept under seal in certain cases, the Commission should ensure that Load Serving Entities (LSEs) show why the information should be kept under seal by explaining how that particular information may be used to harm them. This will serve to remove a lot of the speculation surrounding the claim of harm.

D. The Sixty-Day Rule

DRA supports the proposed rule that requires decisions on motions for protective orders to be issued within sixty days. This rule ensures that the process is expedient and parties can plan given the information they expect to get from such a ruling.

It is consistent with the burden of proof in a motion for protective order to place the onus of following up on the ruling with the party making the motion. Even when the motion is granted, the party must consistently assert the objection in any proceeding where the party believes there is a threat of disclosure.

CONCLUSION

For the reasons stated above, DRA respectfully requests that its recommendations be adopted.

Respectfully submitted,

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June 19, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document
**“OPENING COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES
IN R.05-06-040 TO IMPLEMENT SENATE BILL NO. 1488 RELATING TO
CONFIDENTIALITY OF PROCUREMENT INFORMATION”** in **R.05-06-040**.

A copy has been e-mailed on all known parties of record who have provided e-mail addresses. In addition, all parties have been served by first-class mail.

Executed in San Francisco, California, on the **19th** day of **June, 2006**.

/s/ Joanne Lark

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